No. 14543.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BOYD BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Statement of the Pleadings.

Appellant was charged in an indictment filed in the United States District Court, in and for the Southern District of California, with violations of U. S. C., Title 18, Sec. 371; U. S. C. Title 21, Sec. 174—Conspiracy, Illegal Sale and Concealment of Narcotics. Count one charged a conspiracy with one Albert Hollins; Count Two charged a sale; Count Three charged a sale; Count Four charged a concealment, etc.; and Count Five charged a concealment, etc. (The indictment was in seven counts, but only five referred to defendant Brown.) [Clk. Tr. pp. 2-5.]

Defendants made a motion to dismiss Counts 2, 3, 4 and 5 of the indictment which was denied [Clk. Tr. pp. 7-9]. Defendants entered a plea of not guilty as charged [Clk. Tr. p. 10].

The matter proceeded to trial before a jury [Clk Tr. p. 11].

Appellant was found guilty on all five counts [Clk. Tr. p. 20]. Appellant was sentenred to five years in a penitentiary on each count, the sentences to run concurrently, and a $250 fine [Clk. Tr. p. 22]. This conviction was reversed by the Ninth Circuit Court of Appeals [Clk. Tr. p. 27].

The matter again proceeded to trial by jury [Clk. Tr. p. 22]. At the second trial Count One charging conspiracy was dismissed, and the trial proceeded on Counts 2, 3, 4 and 5 [Clk. Tr. p. 29]. Appellant was adjudged guilty on the four counts upon which he was tried [Clk. Tr. p. 37]. As a result of this second conviction, defendant was sentenced to ten years imprisonment on each count to run consecutively, making a total sentence of 40 years imprisonment and a total fine of $8,000 [Clk. Tr. p. 38].

This is an appeal from the judgment rendered against defendant [Clk. Tr. pp. 41-42].

Basis of Jurisdiction.

It is contended that the District Court had jurisdiction by virtue of Title 18, Section 546, U. S. C. A., and this court has jurisdiction to review the judgment in question by virtue of Title 28, Sections 41(2) and 225(a) U. S. C. A.

Statement of the Case.

By way of an introductory statement it may be pointed out that at the first trial, one Frank J. Stafford testified. Stafford was deceased at the time of the second trial and his testimony was read by one George R. Davis [Rep. Tr. pp. 13-21]. In referring to this testimony, we shall refer to it as the testimony of Frank J. Stafford.

Frank J. Stafford, an admitted narcotic addict [Rep. Tr. p. 74], testified that in February or March, 1953, he met defendant [Rep. Tr. p. 23]. He made an appointment with Brown over the telephone [Rep. Tr. p. 36]. As a result of this telephone conversation, Brown came to his home at which time they had a conversation [Rep. Tr. p. 27]. He asked Brown if he could furnish him with two ounces of heroin. Brown told him that he thought he could out of four ounces which he had for his personal use. The witness then gave Brown his telephone number with instructions to call him [Rep. Tr. p. 28]. He next met Brown on Adams and Normandie about March 4th [Rep. Tr. p. 31]. He had been furnished with $600 in Government funds [Rep. Tr. p. 32]. He entered the car with Brown and drove to 22nd Street and he gave Brown the $600. They then proceeded to 21st Street where they saw another man. Brown told the man that he was the party that wanted the heroin and to let him have it when he came back [Rep. Tr. p. 33]. Brown returned him to Adams and Normandie and he went back and picked up the heroin [Rep. Tr. p. 34]. He returned to his home and gave it to Officer Ross [Rep. Tr. p. 35].

He next saw Appellant about March 13 [Rep. Tr. p. 43]. Appellant told him to meet him at Adams and Normandie. This time he also had $600 in Government funds [Rep. Tr. p. 45]. They drove to 28th and Budlong. They looked at courts which Brown said he was contemplating buying and he gave Brown $600. Shortly thereafter two girls drove up in a car and handed Brown a package. Stafford was given two packages from this larger package by Hollins [Rep. Tr. p. 47].

Appellant makes no contention that the exhibits introduced into evidence did not contain heroin, nor does he make any contention that the exhibits were not properly identified by Stafford, as the ones he testified that he received.

On cross-examination Stafford admitted that he was a user of heroin at about the time this transaction took place [Rep. Tr. p. 73]. He was a confirmed addict over a period of years [Rep. Tr. p. 74]. He had a prior conviction for narcotics [Rep. Tr. p. 78]. Brown never personally handed him any narcotics [Rep. Tr. p. 57-A].

Philip P. Ross testified that he was a federal narcotic officer. Frank J. Stafford was employed as a narcotic informer [Rep. Tr. p. 80]. He was hidden in Stafford's home about February 23, 1954, with another narcotic officer. He saw Appellant drive up and enter the house [Rep. Tr. p. 82]. He heard Stafford ask Brown to purchase some narcotics and Brown replied, "No. I have just enough for my own use." Brown said he had a shipment coming and he would let Stafford have two ounces of stuff [Rep. Tr. p. 83]. He testified that he gave Stafford $400 [Rep. Tr. p. 84]. "He said he was going to purchase narcotics from Brown." He followed Stafford to Adams and Normandie. This was about 7:30 or 8:00 o'clock [Rep. Tr. p. 85]. He saw Stafford enter Brown's car and drive away. He did not follow them [Rep. Tr. p. 86]. When Stafford returned he handed him some narcotics [Rep. Tr. p. 87].

He was again present in the home of Stafford on March 13, 1953, with agents Perry and Richards [Rep. Tr. p. 95]. They again provided Stafford with $600. He followed Stafford to Adams and Normandie and saw

Stafford enter an automobile with Brown and Hollins [Rep. Tr. p. 96]. He saw Stafford later that evening at his home and Stafford gave the officers some packages containing narcotics [Rep. Tr. p. 97].

On neither occasion did he see Appellant hand Brown any narcotics [Rep. Tr. p. 99]. None of the money given Stafford was ever discovered on Brown [Rep. Tr. p. 100]. At the time officer Ross had Stafford making these alleged purchases he did not know that he was an addict [Rep. Tr. p. 103]. He did not search the informer Stafford after he returned to the house [Rep. Tr. p. 104]. He testified that they more or less have to depend upon information secured from addicts [Rep. Tr. p. 117].

Norman D. Perry testified that he was a federal agent [Rep. Tr. p. 126]. On February 24, 1953, he saw Appellant enter Stafford's house and then leave [Rep. Tr. p. 127]. He next saw Appellant on March 14th [Rep. Tr. p. 129]. He gave Stafford $600 and accompanied him to Adams and Normandie [Rep. Tr. p. 130]. He then returned to Stafford's residence and shortly thereafter he returned with some narcotics [Rep. Tr. p. 131]. At no time did he see Appellant hand Stafford any narcotics [Rep. Tr. p. 143].

Michael C. Coster testified that he was a narcotic agent [Rep. Tr. p. 171]. On February 24th he was in the home of Frank Stafford with Agent Ross [Rep. Tr. p. 172]. He saw Brown approach and enter the house and heard a conversation between Stafford and Brown concerning narcotics [Rep. Tr. p. 173]. He next saw Brown on March 4th at Normandie and Adams [Rep. Tr. p. 174]. He saw Stafford enter Brown's car and they drove off [Rep. Tr. p. 175]. They returned to

Adams and Normandie and Stafford got in his car. They followed Stafford to 21st and Mariposa where they observed him in conversation with another man [Rep. Tr. p. 176]. They then returned to Stafford's home where they were handed some narcotics [Rep. Tr. p. 177]. He then again saw Brown on March 13th [Rep. Tr. p. 178]. He and Hollins entered an automobile. He followed them, but got lost [Rep. Tr. p. 179].

Annette Cannady testified that on March 13th she was present at some apartment on Budlong [Rep. Tr. p. 229]. She saw Appellant when she arrived there [Rep. Tr. p. 230]. Appellant came over and got in the car and they drove off [Rep. Tr. p. 231].

Celeste Bates testified that she was present with Miss Cannady on March 13th. They rode over to 38th and Budlong to pick up the defendant. She did not see Miss Cannady hand the defendant a package [Rep. Tr. p. 245].

Specification of Errors.

1. The Court erred in failing to dismiss the indictment.

2. Insufficiency of the evidence to justify the judgment of conviction.

3. Misconduct of the Assistant United States Attorney which prevented the defendant from having a fair and impartial trial.

4. The Court erred in its instructions to the jury.

5. The trial Court abused its discretion in the pronouncement of judgment and sentence.

ARGUMENT.

I.

The Court Erred in Failing to Dismiss the Indictment.

Appellant was charged with violating Title 21, Sec. 174, of the U. S. Code.

Count Two: This count fails to allege one of the necessary elements of the offense, in that it fails to state that the narcotics drug referred to therein was imported into the United States "contrary to law." Title 21, Section 174, U. S. Code, expressly states the offense in these terms:

> "If any person * * * imports * * * any narcotic drug * * * contrary to law, or * * * sells * * * any such narcotic drug after being imported * * * knowing the same to have been imported contrary to law * * *"

Appellant contends that under this statute a valid indictment must allege not only that defendant sold the narcotic drug knowing that it had been imported contrary to law, but also that the drug was "imported contrary to law."

Crank v. United States, 61 F. 2d 620;

Wisbart v. United States, 29 F. 2d 103;

United States v. Cook, 84 U. S. 168, 174;

Hartson v. United States, 14 F. 2d 561.

Since the fact of the importation contrary to law must be established, by proof or presumption or both, the full allegation must be in the indictment as to which such proof would be directed.

See:

Pon Wing Quong v. United States, 111 F. 2d 751.

Counts Three, Four and Five are objected to on the same ground as Count Two, above.

Counts Three, Four and Five are also defective in that each Count states more than one offense.

Each of the various acts prohibited by Section 174, Title 21, U. S. Code, constitutes a separate offense, and such act is punishable separately.

See:

Walsh v. White, 32 F. 2d 240;

Palermo v. United States, 112 F. 2d 922;

Corrello v. Dutton, 63 F. 2d 7.

Count Three charges that defendant Brown and Hollins did * * * sell * * * and knowingly assist in so doing * * * a certain drug.

Count Four charges that defendant did * * * receive, conceal, and facilitate the transportation of * * * a certain drug.

Count Five charges that defendant Brown and Hollins did, * * * receive, conceal, and facilitate the transportation of a certain drug * * * and knowingly assist in so doing * * *.

We respectfully submit that each of the acts constituted a separate offense, and only one such act may be included in each count.

II.

Insufficiency of the Evidence.

It is the contention of Appellant that the evidence is insufficient to sustain the judgment. It might be pointed out here that there is no evidence in the record that Appellant ever had any narcotics in his possession relative to the sale of March 4th. The testimony of Frank Stafford was to the effect that some other man delivered the package to him [Rep. Tr. p. 34]. With relation to the alleged sale of March 13th, he testified that he was given the narcotics by Hollins [Rep. Tr. p. 47]. Appellant contends that where it is not shown that defendant had the narcotics in his possession, then it is incumbent upon the prosecution to prove that the narcotics were imported contrary to law.

It is the possession which raises the presumption of unlawful importation. Unless it is shown that defendant was in possession of the narcotics then this presumption cannot arise and the burden of proof is then on the government. Neither is there any evidence in the record that Appellant concealed or facilitated the transportation of narcotics.

The last sentence of this section must be strictly construed.

United States v. One Studebaker, 40 F. 2d 557.

III.

Misconduct of the Assistant United States Attorney.

Appellant contends that the Assistant United States Attorney was guilty of prejudicial misconduct which prevented him from having a fair and impartial trial. During defendant's defense he offered certain witnesses to impeach the reputation of Frank Stafford for truthfulness, honesty and integrity. This the defendant had a right to do. Nevertheless, we have the attorney making such statements and asking such questions as follows:

> "Mr. Neukom: I object to that, your Honor, upon the ground that no effort was made to impeach the testimony of Stafford during his lifetime and I do not think it is a material issue in this case." [Rep. Tr. p. 193.]
>
> "Q. Isn't it true that you are testifying about Mr. Stafford because you know his lips are sealed? A. No.
>
> Q. And he can't answer you? A. No." [Rep. Tr. p. 201.]
>
> "Q. You knew of Mr. Brown, didn't you? A. I did.
>
> Q. And you had had occasion to hear about him in conjunction with police work, hadn't you?" [Rep. Tr. p. 207.]
>
> "Q. As a matter of fact, Mr. Ayers, aren't you actually testifying in this court here because you are a good friend of Mr. Gordon and you want to help Mr. Gordon's client out? A. I am a good friend of everybody, not singling anyone out.
>
> Q. Not a very good friend of the dead Mr. Stafford, are you? A. I wasn't his enemy.

Q. You were not willing to testify against his reputation when he was alive, were you? A. I was. I was available." [Rep. Tr. pp. 219-220.]

The prosecuting attorney must endeavor to conduct prosecution in such manner as to avoid unnecessary errors in trial.

Taliaferro v. United States, 47 F. 2d 699.

Prosecutors should refrain from making statements that they might prove things derogatory to a defendant unless they are able to make such proof and intend to do so.

People v. Reznick, 75 Cal. App. 2d 832.

Prosecutors should remember that accused is entitled to a fair trial, and that they are duty bound not to take advantage of their official position so as to deprive him of such right.

People v. Burnette, 39 Cal. App. 2d 215.

It will be seen from a careful reading of the cross-examination of these witnesses [Rep. Tr. pp. 195, 204, 214] that it was calculated to prejudice the rights of defendant. The cross-examination was directed to form the impression that the evidence was improper and had no place in the trial. Clearly, this was error.

IV.

Error in Instructing the Jury.

At the conclusion of the trial the Court gave the following instruction:

> "In a case where two or more persons are charged with the commission of a crime, the guilt of the accused may be established without proof that all the defendants did every act constituting the offense." [Rep. Tr. p. 257.]

Appellant contends that this was an erroneous statement of law. In this case originally there were two defendants. The instructions state in effect that Appellant could be convicted without proof that Hollins did all the acts constituting the offense [Rep. Tr. p. 257]. In other words, under this instruction Appellant could have been convicted by a failure to establish a case against Hollins.

V.

The Court Abused Its Discretion in Pronouncing Sentence and Judgment.

When Appellant was first tried he was charged with five counts in the indictment [Clk. Tr. p. 11]. Upon his conviction for these five counts he was given five years on each count to run concurrently, for a total of five years imprisonment and a $250 fine [Clk Tr. p. 22]. He appealed this conviction and it was reversed [Clk. Tr. p. 27]. Upon his second trial, Count One of the indictment was dismissed and Appellant was convicted on four counts. The trial court then ordered defendant imprisoned for forty years, and a total fine of $8,000 [Clk. Tr. p. 38]. Thus we have the defendant sentenced to 35 more years

and an increase in fine of $7,750 on lesser counts. The only logical reason that can be advanced for such a heavier penalty is to penalize and inflict punishment upon defendant for taking an appeal from the first conviction. Clearly this amounts to an abuse of discretion. There is nothing in the record to show any changed circumstances or conditions that would warrant the infliction of a heavier sentence. In fact there was one less count.

Where it is manifest that the sentence imposed is excessive, the Appellate Court may, in the exercise of its statutory power to correct errors in the judgment appealed from, reduce or modify the same.

Bates v. United States, 10 Fed. 92.

It might here be pointed out that the sentence imposed in this action is probably one of the severest ever meted out. It should also be pointed out that Counts Two and Four arose out of the same transaction and Counts Three and Five arose out of the same transaction. There is nothing in the record to show that a greater penalty should have been imposed than in the first trial.

Where it appears from the evidence that the sentence imposed is excessive or visits too severe a punishment, the Appellate Court may, in the exercise of its statutory power to correct errors in the judgment appealed from, reduce or modify the sentence.

3 *Am. Jur.* 689.

The second sentence in this action is so disproportionate to the first sentence that it shocks one's sense of fairness and justice. Such a sentence can serve only one purpose. That is, to serve as a warning and to discourage defendants in criminal actions from appealing. Certainly

the defendant had a right to appeal. This is further borne out by the fact that the prior conviction was reversed. We do not think that a person should be punished solely for the reason that he has taken an appeal. Was the defendant compelled to stand on the original conviction which had been erroneously obtained, or suffer greater penalties by appealing the erroneous conviction? It is clear that the sentence was given because of passion or prejudice, for no other reason appears in the record.

Conclusion.

For the foregoing reasons, we respectfully submit that the judgment should be reversed, or in the event that the judgment is affirmed, it should be modified to conform to the sentence rendered upon the first trial.

Respectfully submitted,

Walter L. Gordon, Jr.,

Attorney for Appellant.